Supreme Court, U.S.
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No. 98-885

In The

Supreme Court of the United States

October Term, 1998

NANCY G. PERE', individually and on behalf of her minor children, Matthew Reed Pere' and Marci Danielle Pere',

Petitioner,

versus

NUOVO PIGNONE S.p.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding for purposes of the application of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, that a defendant's foreign state status is determined at the time of the events giving rise to the litigation even though the defendant is a private entity at the time the lawsuit is filed.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in holding for purposes of the second clause of the "commercial activity" exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), that a "material connection" must exist between a commercial act occurring in the United States and the plaintiff's cause of action.

3. Whether the United States Court of Appeals for the Fifth Circuit erred in finding that a foreign state does not waive its jurisdictional immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, in a personal injury lawsuit simply because it has signed a contract with a third party which contains an arbitration clause and a choice of law provision selecting Texas law.[1]

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[1] Defendant-Respondent, Nuovo Pignone, S.p.A., submits that the so-called "tiering" argument presented to this court by both Petitioner and Defendant-Respondents, Coppus Engineering, Inc. and Tuthill Corporation, has been waived or abandoned by the parties as a result of not being raised on appeal before the Fifth Circuit. *See* Argument, *infra*, at Section II(A).

LIST OF PARTIES

Petitioner and Plaintiff-Appellee below is Nancy G. Peré. She has filed this lawsuit individually and on behalf of her minor children, Matthew Reed Peré and Marci Danielle Peré, for injuries resulting from the death of Marcus Peré, her husband and the minor children's father.

Respondent and Defendant-Appellant below is Nuovo Pignone, S.p.A. Its wholly owned subsidiary, Pignone, Inc., remains a defendant in the court below. Nuovo Pignone, S.p.A. is presently owned by a consortium of entities with its leading shareholder being General Electric Company.

Respondent and Defendant-Appellee below is Tuthill Corporation. Tuthill Corporation is the successor-in-interest to co-defendant Coppus Engineering. Tuthill Corporation has no subsidiary or parent corporations. For purposes of this Petition for Certiorari, Tuthill Corporation has aligned itself with Petitioner.

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Nuovo Pignone, S.p.A. ("Nuovo Pignone"), respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Nancy G. Peré and submits that this Honorable Court should deny the Petition.

OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 150 F.3d 477 (5th Cir. 1998) and is reprinted in the Appendix to Petitioner's brief ("Pet. App.") at A1. The Memorandum Ruling and Order of the United States District Court for the Western District of Louisiana, Lafayette Division is unreported, but is reprinted in Pet. App. at B1.

STATUTES INVOLVED

This Petition involves the interpretation and application of the Federal Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. The relevant sections of the FSIA include 28 U.S.C. § 1602, 1603, 1604 and 1605. Petitioner has included the relevant statutes in her Petition at Pet. App. at G1 with the exception of 28 U.S.C. § 1604 which is reproduced below.

> **28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts.

I. STATEMENT OF THE CASE

This case presents issues regarding the interpretation and application of the FSIA to Defendant-Respondent, Nuovo Pignone. To the extent Petitioner has not waived or abandoned issues presented to this Court, there is no split in the circuit courts regarding these issues and, therefore, no compelling need for this Court to grant the Petition. Moreover, even if grounds were present suggesting that this Court review the decision of the court below, the United States Court of Appeals for the Fifth Circuit correctly decided the case and review is therefore unnecessary.

A. Factual Background

Petitioner's decedent, Marcus Peré ("Peré"), was employed by Chevron Overseas Petroleum and/or Cabina Gulf Oil Co. ("CABGOC"), a division of Chevron, as an instrument technician in Angola, off the coast of West Africa. Pet. App. at A2. CABGOC is an oil company operating off the coast of West Africa. Pet. App. at A1-A2.

In 1974, Nuovo Pignone, an Italian company that designs and builds turbine systems, purchased a starter

turbine from Coppus Engineering ("Coppus/Tuthill"), a United States company, to be incorporated into a turbine system. Pet. App. at A2. In 1979, Nuovo Pignone contracted with CABGOC for the sale of th rteen identical turbine systems. One of those thirteen turbine systems incorporated the starter turbine sold by Coppus/Tuthill. It was this turbine system that was involved in the death of Peré. Nuovo Pignone manufactured, tested and inspected the incident turbine system in Italy. Pet. App. at A2. The incident turbine system was then shipped to Bayou Black, Louisiana for installation on a platform which was itself subsequently shipped to the CABGOC facility off the coast of Angola, Africa as a complete unit. Pet. App. at A2.

There was testimony that a Nuovo Pignone representative might have been present for this installation of the turbine system onto the platform in Louisiana, but the representative would have only served a consulting function with regard to the mechanical erection of the turbine system onto the platform; he would not have participated in the physical erection/installation of the system onto the platform nor would he have been engaged in any design or manufacture of the turbine system itself in Louisiana. Pet. App. at A8.

On 16 October 1993, Peré was working on the gas injection platform "GIP-FOX," located off the coast of Angola in West Africa. Pet. App. at A2. He was performing testing procedures on a gas turbine system when, as alleged by plaintiff, the starter turbine manufactured by Coppus/Tuthill and incorporated into the Nuovo Pignone turbine system, exploded and fatally injured him. Pet. App. at A1; Pet. App. at D5.

At the time of the accident, a majority of the shares of Nuovo Pignone were owned by Ente Nazionale Idrocaburi ("ENI"). Pet. App. at A3. ENI is a joint stock company reporting to the Minister of Treasury of Italy who held the majority of ENI's shares for the benefit of the Republic of Italy. Pet. App. at A3. ENI was created by the Republic of Italy for the purpose of leading Italy's oil and gas development and exploration. Pet. App. at A3. After the events involved in this case, including the death of Peré, but before Petitioner filed her lawsuit, a majority of the shares in Nuovo Pignone were sold to a consortium of private companies. Pet. App. at A4.

B. Proceedings in the District Court

Plaintiff-Petitioner commenced this action in the United States District Court for the Western District of Louisiana, Lafayette Division along with two other virtually identical suits in the Southern District of Texas (Galveston and Houston Divisions). Pet. App. at B3 n.1. The three courts later entered a series of rulings which ultimately resulted in the consolidation of all claims in the United States District Court for the State of Louisiana. Pet. App. at B3 n.1. In the action, Plaintiff-Petitioner alleged that the turbine system, which included the Coppus/Tuthill starter turbine and which was involved in the fatal incident, was defectively designed and/or manufactured by Nuovo Pignone and others. Pet. App. at A2-A3; Pet. App. at D1.

In the district court, Nuovo Pignone moved for summary judgment seeking dismissal of plaintiff's claims pursuant to the FSIA. Pet. App. at B4-B5. Plaintiff and

defendants, Coppus Engineering and Tuthill Corporation, filed cross motions/oppositions challenging the propriety of dismissal under the FSIA. Pet. App. at B4-B5. The district judge regarded these motions/oppositions as Rule 12(b)(1) pleadings, inasmuch as the invocation of the FSIA challenged the court's subject matter jurisdiction. Pet. App. at B4-B5.

The district judge entered a Memorandum Ruling and Order denying Nuovo Pignone's request for dismissal. Pet. App. at B1. The district judge concluded that although the FSIA applied to Nuovo Pignone, and Nuovo Pignone qualified as a foreign state, the statute's "commercial activities" exception, 28 U.S.C. § 1605(a)(2), precluded dismissal. Pet. App. at A1-A2; Pet. App. at B19. An appeal on behalf of Nuovo Pignone ensued.

C. The Fifth Circuit Decision

Nuovo Pignone appealed the district court's Memorandum Ruling and Order arguing to the Fifth Circuit that although the district court was correct in finding Nuovo Pignone to be a foreign sovereign, the district court nevertheless erred in concluding that Plaintiff-Petitioner met her burden of proof on the applicability of the "commercial activities" exception to the FSIA, 28 U.S.C. § 1605(a)(2).

In response to these arguments, both Plaintiff-Petitioner and Defendant-Respondent Coppus/Tuthill submitted opposition briefs arguing that the district court properly found the commercial activities exception. Appendix at 15-21; 40-46. They each further argued that in order to be immune under the FSIA a defendant must

be a foreign sovereign at the time the lawsuit is filed as opposed to when the events underlying the action occurred. Appendix at 23-24; 46-48. Thus, they argued that Nuovo Pignone's recent privatization mandated that it be subject to a lawsuit in the United States regardless of its prior sovereign status. *Id.* Finally, Plaintiff-Petitioner made the further argument that Nuovo Pignone had waived its sovereign immunity through contractual agreement. Appendix at 22. Significantly, neither Plaintiff-Petitioner nor Defendant-Respondent Coppus/Tuthill made any argument to the Fifth Circuit regarding the "tiering" issue now presented by both Petitioner and Coppus/Tuthill for this Court's review.[2] Appendix at 6, 32.

The Fifth Circuit rejected the argument that the foreign sovereign status determination is made at the time suit is filed, stating:

> Whether the FSIA covers an entity now private that was state owned at the time of the disputed event(s) is a first impression within this Circuit. Having studied both *Straub*[3] and *General Electric*,[4] we are persuaded by the Eighth Circuit's reasoning in *General Electric*. As the

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[2] "Tiering" as that term is used in FSIA analysis refers to the issue of whether an entity must be directly owned by a foreign sovereign to be entitled to FSIA immunity as agency or instrumentality of a state or whether it may be, for example, a subsidiary of another company that is owned by a foreign sovereign. *See In re Air Crash Disaster near Roselawn, Indiana*, 96 F.3d 932, 939-941 (7th Cir. 1996) (discussing tiering under the FSIA).

[3] *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994).

[4] *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993).

> Eighth Circuit stated, "the doctrine of foreign state sovereign immunity was created to effectuate general notions of comity among nations." *Id.* at 1382 (internal quotations and citations omitted). The foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed. Thus, courts are to look to the defendant's status at the time the litigated events occurred.

Pet. App. at A5. Because Nuovo Pignone was a foreign state at the time of the events giving rise to this litigation, the Fifth Circuit affirmed the decision of district court finding Nuovo Pignone a foreign state under the FSIA. Pet. App. at A6.

The Fifth Circuit also found in favor of Nuovo Pignone on the application of the "commercial activities" exception of the FSIA, reversing the district court and holding expressly that Plaintiff-Petitioner failed to carry her burden of proof on the existence of a "material connection" between the alleged commercial act performed by Nuovo Pignone in the United States and her cause of action. Pet. App. at A7-A8. Addressing this issue, the Fifth Circuit wrote:

> Concededly, Nuovo Pignone did send representatives to consult on the mechanical erection of the components onto the platform; however, there is no indication in the record concerning the extent or nature of the consultation or to show it as an integral part of the design or manufacture. While this Court is told that the

> Nuovo Pignone representatives consulted, we are left to guess at what the consultation involved. There is simply no indication that the final assembly in Bayou Black [Louisiana] was a part of the design or manufacture that occurred in Italy. Thus, we cannot say that there is material connection between Nuovo Pignone sending consultants to Bayou Black and Peré's [Petitioner's] wrongful death action.

Pet. App. at A8-A9. Because Petitioner's wrongful death action alleged design and manufacturing defects as the cause of Peré's death and because Petitioner could not establish that any design or manufacturing activities were "materially connected" with the United States, the commercial activities exception could not be applied. *Id.*

In response to Plaintiff-Petitioner's waiver arguments, the Fifth Circuit took little time in holding that the execution of a contractual choice of law clause and a contractual arbitration clause by a foreign sovereign does not waive any sovereign immunity in litigation with parties not signatories to the agreement. Pet. App. at A9-A10. As Petitioner's wrongful death action was not grounded on the contract and neither Petitioner nor her decedent were parties to the contract, the alleged contractual waiver of immunity could not apply to Petitioner's action. Pet. App. at A10.

Finally, the Fifth Circuit did not address the "tiering" issue presented now to this Court, because no party (whether Petitioner or otherwise) raised the "tiering" issue in its brief to the Fifth Circuit. Pet. App. at A1; Appendix at 6, 32.

II. REASONS FOR DENYING THE WRIT

A. Petitioner and Defendant Respondent Coppus\Tuthill waived, or alternatively, abandoned the "tiering" argument as neither Petitioner nor Coppus\Tuthill presented the "tiering" argument before the Fifth Circuit.

A party who fails to advance an issue in the court of appeals effectively waives the right to assert that issue as this Court will not consider issues that were not presented to the court of appeals. *See EEOC v. Federal Labor Rel. Bd.*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983) (refusing to address issues not raised in the court of appeals); *Rodgers v. Lodge*, 458 U.S. 613, 628 n.10 (1982) (same); *see also United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n. 2 (1981) (noting that this Court does not address issues raised by amici that were not decided by the court of appeals or argued by the interested party).

Both Petitioner and Defendant-Respondent Coppus\Tuthill suggest that alleged improper "tiering" of ownership of Nuovo Pignone is a question to be presented to this Court for review; however, neither Petitioner nor Coppus\Tuthill advanced the so-called "tiering" argument before the United States Court of Appeals for the Fifth Circuit. Appendix at 6, 32. Because no party advanced a "tiering" argument in the Fifth Circuit, the Fifth Circuit's opinion is silent on the issue. Pet. App. at A1.

Because no party advanced a "tiering" argument in the Court of Appeals and because the Fifth Circuit did not have the opportunity to rule on such an issue, it would be imprudent for this Court to now address the "tiering" argument. Accordingly, the "tiering" argument should be deemed abandoned by both Petitioner and Defendant-Respondent Coppus\Tuthill. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (holding that nonjurisdictional defects such as a waiver resulting from the failure to advance an argument in the court of appeals are properly brought to the Court's attention in respondent's brief in opposition to petition for writ of certiorari).

B. This Court Should Deny the Petition Because the Sole Basis for Seeking this Court's Discretionary Review, Namely to Resolve a Split Among Circuit Courts, Has Not Been Established.

Petitioner argues that this Court should grant her Petition pursuant to this Court's Rule 10(a) because the circuit courts are divided on each of the four issues she presents for review. Disregarding claims related to "tiering" which were abandoned in the court below, Petitioner claims that the circuit courts are split over the following issues: (1) the timing of the determination of foreign state status when a party has become a private entity; (2) in the application of the "commercial activities" exception of the FSIA, whether there must be a "material connection" or simply a "nexus" between the plaintiff's cause of action and the act performed by the foreign state in the United States in connection with commercial activities elsewhere; and (3) whether a contractual agreement

entered into by a foreign state which contains arbitration and choice of law clauses effectively waives the state's sovereign immunity under the FSIA in a tort lawsuit filed by a third party.

Petitioner errs when she alleges that the circuit courts are divided on the issue of the timing of the determination of foreign sovereign status. The fault in her argument is that she has broadened the reach of the issue presented in this case in order to create a conflict in the circuit courts; the issue presented here is more limited than Petitioner suggests to this Court. The question presented here is at what time does a court determine sovereign status for purposes of the FSIA where an entity loses its foreign sovereign status between the date of the event creating the cause of action and the date the lawsuit is filed.

In the case *sub judice,* the United States Court of Appeals for the Fifth Circuit correctly held that foreign sovereign status, in cases where the entity loses its foreign sovereign status between the event giving rise to the lawsuit and the date the lawsuit is filed, is determined at the time the events which gave rise to the lawsuit occurred. Pet. App. at A5. In rendering its decision which was one of first impression in the circuit, the Fifth Circuit joined the Sixth Circuit and the Eighth Circuit, each having squarely addressed the issue. *See Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F.2d 445, 450 (6th Cir. 1988) (holding that party who was privatized during pending appeal was a foreign sovereign under the FSIA because party was a foreign sovereign at the time the events giving rise to the lawsuit occurred); *General Electric Capital Corp. v. Grossman,* 991 F.2d 1376, 1381 (8th Cir. 1993) (holding that Air Canada was a "foreign state" under the

FSIA even though it had been privatized prior to the filing of the lawsuit).

The only circuit court alleged by Petitioner to be in conflict with the Fifth Circuit's decision on this point is the Ninth Circuit in its *Straub* decision. *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). However, as observed by the Fifth Circuit in its decision below, the *Straub* case is clearly distinguishable. Pet. App. at A5-A6. In *Straub*, the entity seeking immunity under the FSIA had become a foreign sovereign since the events giving rise to the lawsuit occurred. *Straub*, 38 F.3d at 451. In the case *sub judice*, Nuovo Pignone was a foreign state when the events giving rise to the lawsuit occurred, but became a private entity before the lawsuit was filed. The Ninth Circuit recognized the clear difference between the facts presented to it in *Straub* and those presented to the Eighth and Sixth Circuits in their decisions. *Id.* Comparing the cases, the Ninth Circuit wrote: "Neither court [Sixth or Eighth Circuit] addressed the issue of whether the FSIA applies when a party is not a foreign state at the time of the alleged wrongdoing but becomes one prior to the date on which the lawsuit is filed." *Id.* Thus, the Ninth Circuit did not address the factual scenario presented to the Fifth, Sixth and Eighth Circuits; rather, the Ninth Circuit held only that an entity qualifies for immunity under the FSIA if it is a foreign sovereign at the time the lawsuit is filed. *Id.* The *Straub* decision does not address application of the FSIA with regard to entities that were foreign sovereigns at the time of the events giving rise to the litigation but have lost that status before the plaintiff files his lawsuit. That issue, which is the one *sub judice*, was simply not before the *Straub* court.

Accordingly, *Straub* does not conflict with the decision of the Fifth Circuit Court of Appeals in this case. Because there is at present no split in the circuit courts on the timing issue presented by the Fifth Circuit's decision *sub judice*, there is no compelling reason for this Honorable Court to grant Petitioner's writ on this ground. S. Ct. R. 10(a).

Similarly, Petitioner has not demonstrated that a split in the circuit courts exists with regard to the application of the "commercial activities" exception to the FSIA. With respect to the promised conflict, Petitioner compares only two cases. Petition at 19. Petitioner asks this Court to compare the Fifth Circuit's standard applied below which requires a "material connection" between the "act" in the United States and a plaintiff's cause of action and the Ninth Circuit's allegedly more lenient standard applied in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). Any comparison of these decisions will find an identical standard being applied by the two circuits. The Fifth Circuit held (and Petitioner has not contested) that for the commercial activity exception to apply in this case, Nuovo Pignone's actions must fall within the second listed exception of 28 U.S.C. § 1605(a)(2). Pet. App. at A6. Thus, Petitioner's suit must be "based . . . upon an act performed within the United States in connection with a commercial activity of a foreign state elsewhere." 28 U.S.C. § 1605(a)(2). In *Siderman de Blake*, the Ninth Circuit examined the very standard applied to the second listed exception of § 1605(a)(2), stating:

> As the few cases to address this clause have noted, it requires a "material connection . . . between the plaintiff's cause of action and the

> act performed in the United States." *Stena Rederi AB. v. Comision de Contratos del Comite Ejecutivo General*, 923 F.2d 380, 388 (5th Cir.1991) (emphasis in original). A plaintiff must either demonstrate a causal connection between a sovereign's actions in the United States and those abroad giving rise to the plaintiff's claims, or the sovereign's acts in the United States must themselves represent an element in the plaintiff's cause of action. *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n. 22 (D.C.Cir.1982); *see also* H.R.Rep. No. 1487, 94th Cong., 2d Sess. 19, reprinted in 1976 U.S.C.C.A.N. 6613, 6618.

Thus, not only does the Ninth Circuit apply the same "material connection" standard relied upon by the Fifth Circuit *sub judice*, but the Ninth Circuit also cites Fifth Circuit precedent on point approvingly. The Fifth and Ninth Circuits are not split on this issue at all, but are, in fact, applying identical standards to the analysis. Accordingly, a split in the circuit courts has not been established by Petitioner on this issue; accordingly, exercise of this Court's discretion in granting the petition for writ of certiorari is unwarranted. S. Ct. R. 10(a).

Likewise, Petitioner has pointed to no conflict in the circuit courts on the FSIA waiver issue presented for review. Again, Petitioner fails in her promise to expose a conflict in the circuit courts of appeal on the interpretation of what acts constitute a waiver of immunity under the FSIA. In point of fact, Petitioner does not cite even a single decision of a court of appeals in her waiver argument. Instead, petitioner cites only three federal district court decisions in support of her allegation of a conflict in the circuits. Accordingly, the waiver issue presented by

Petitioner does not warrant, much less compel, that this Court exercise its power of certiorari. S. Ct. R. 10(a).

C. This Court Should Deny the Petition Because the Decision of the United States Court of Appeals for the Fifth Circuit is Correct.

1. The Fifth Circuit correctly found that Nuovo Pignone is a foreign state under the FSIA.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993), *quoting, Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). "Under the FSIA, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355.

Both the district court below and the Fifth Circuit properly determined that Nuovo Pignone was a "foreign state" entitled to FSIA immunity. In this regard, the applicable statutory language defines foreign state as "includ(ing) . . . an agency or instrumentality of a foreign state." 28 U.S.C. § 1603. It is undisputed that Nuovo Pignone was majority owned by ENI at the time of the October 1993 accident, and that ENI was an agency or instrumentality of the Republic of Italy at all relevant times. Pet. App. at A3.

The Fifth Circuit made the following uncontested characterization of the evidence which it viewed as dispositive of Nuovo Pignone's FSIA immunity:

> It [Nuovo Pignone] established that Ente Nazionale Idrocaburi ("ENI") was the majority shareholder [of Nuovo Pignone] at the time of the accident and that the Republic of Italy created ENI to lead Italy's oil and gas exploration and development. Thus, Nuovo Pignone argued, because ENI is an agent or instrumentality of the Italian government, it was a foreign state entitled to immunity. The district court agreed.
>
> * * *
>
> We . . . affirm the district court's finding that Nuovo Pignone is a foreign state under the FSIA.

Pet. App. at A3; A6. Petitioner does not challenge the Fifth Circuit's findings of fact, but rather avers that the time at which Nuovo Pignone's foreign sovereign status must be examined is the date a lawsuit is filed and not the date of the events giving rise to litigation.

Because Nuovo Pignone was privately held at the time Petitioner filed her action, Petitioner submits that it cannot claim immunity under the FSIA. Notwithstanding Nuovo Pignone's status as a privately owned company at the time Petitioner filed suit herein, the Fifth Circuit correctly concluded that ENI's ownership of Nuovo Pignone at the time of the accident was legally dispositive of foreign state status under the FSIA. Pet. App. at A5-A6. *See General Electric Corp. v. Grossman*, 991 F.2d 1376, 1382 (8th Cir. 1993) ("considerations underlying sovereign immunity are not necessarily eliminated when the defendant loses its status as a foreign state before the time of

filing suit"); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988) (holding that sovereign state status is tested at the time the underlying events giving rise to litigation occurred); *Delgado v. Shell Oil Co.*, 890 F.Supp. 1324, 1340 n. 33 (S.D.Tex. 1995) (defendant entitled to immunity because it was state-owned at time of plaintiff's exposure to harmful products, notwithstanding fact that defendant later became privately owned).

The only authority cited by Petitioner for the proposition that the Fifth Circuit erred in its timing determination is *Straub v. A. P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). As observed by the Fifth Circuit in its decision below, *Straub* is inapposite. "*Straub* is distinguishable because it addressed different facts. In *Straub*, the Ninth Circuit was determining how to treat a corporation that became a foreign state for FSIA purposes after the disputed events occurred but before suit was filed." Pet. App. at A5-A6. Moreover, the Ninth Circuit itself specifically distinguished its ruling in *Straub* from a case where the defendant was a foreign state at the time of the events giving rise to the lawsuit but became a private entity before suit was filed. *Straub*, 38 F.3d at 451. *Straub* simply does not address the issue presented here.

Because Petitioner has provided no authority for reversal of the Fifth Circuit's decision here, the timing issue presented by Petitioner provides no basis for a writ of certiorari.

2. The Fifth Circuit was Correct in Holding that Petitioner Failed to Carry Her Burden of Proof on the Commercial Activity Exception to the FSIA.[5]

Once a defendant establishes that it is a foreign state under the FSIA, the burden of proof shifts to the plaintiff to establish that one of the statute's exceptions applies. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994); *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1382 (8th Cir. 1993); *Walter Fuller Aircraft Sales v. Rep. of Philippines*, 965 F.2d 1375, 1383 (5th Cir. 1992); *Stena Rederi AB v. Comision De Contratos del Comite*, 923 F.2d 380, 390 n. 14 (5th Cir. 1991).

The FSIA contemplates two instances of sovereign conduct in the United States which may result in an immunity exclusion, including a "commercial activity" in the United States or an "act performed" in the United States in connection with a commercial activity of the foreign elsewhere. 28 U.S.C. § 1605(a)(2). In its decision

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[5] In the courts below, Nuovo Pignone argued that its incidental conduct in Louisiana was not a "commercial activity in the United States" or even an "act performed in the United States in connection with commercial activity elsewhere" as referenced in 28 U.S.C. § 1605(a)(2). The Fifth Circuit did not address this argument because it found that Petitioner had not proved a "material connection"between the "act" and her lawsuit even assuming she could prove that Nuovo Pignone's conduct was "an act performed in the United States in connection with commercial activity elsewhere." *Id.* Nuovo Pignone reserves its right to assert its argument on this point should this Court grant the Petitioner's Writ of Certiorari.

below, the Fifth Circuit expressly held that for the commercial activities exception to apply under the facts presented, Petitioner had to prove that Nuovo Pignone's actions fall within the second clause of § 1605(a)(2). Pet. App. at A6. Petitioner does not contest that holding here. Thus, Petitioner bears the burden of proving that her action is "based . . . upon an act performed in the United States in connection with a commercial activity elsewhere." 28 U.S.C. § 1605(a)(2).

This Court recently considered the FSIA's "based upon" requirement of the commercial activity exception in *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). This Court reasoned:

> Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.

507 U.S. at 357 (citations omitted). Thus, in order to prove that her lawsuit is "based upon" an act performed by Nuovo Pignone in the United States in connection with commercial activity elsewhere, Petitioner must show that the "act" is an element of her claim that, if proven, would entitle her to relief under the theory of her case.

In this case, plaintiff's alleged cause of action cannot fairly be characterized as "based upon" the installation of the turbine system onto a deck platform in Louisiana. To the contrary, plaintiff's claims are based upon Nuovo

Pignone's allegedly defective design and manufacture in Italy of the internal components of the turbine system. Pet. App. at A7. There is no evidence that any commercial activity of designing or manufacturing such components occurred in the United States. In fact, the undisputed evidence is that all of the manufacturing and designing of the incident turbine occurred in Italy. Pet. App. at A8.

Nuovo Pignone's shipment of the separate turbine system components to Louisiana after their sale to CAB-GOC, and their installation onto a deck barge for transport to a West Africa coast facility is not an "element of (plaintiff's) claim that, if proven, would entitle plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. Indeed, the only evidence regarding Nuovo Pignone's involvement with the installation process in Louisiana was the fact that it sent a representative to consult. No design or manufacture occurred in Louisiana. Pet. App. at A8. Accordingly, Petitioner's wrongful death action is not "based upon" any act performed by Nuovo Pignone in the United States. 28 U.S.C. § 1605(a)(2).

In this case, the Fifth Circuit did not apply the FSIA's "based upon" requirements as instructed by *Nelson*. Instead, the Fifth Circuit applied a less stringent standard that there need only be a "material connection" between the plaintiff's cause of action and Nuovo Pignone's Louisiana conduct. Applying this standard, the Fifth Circuit wrote:

> . . . the material connection must exist between the act performed in the United States and plaintiff's cause of action. Here, then, the material connection must exist between the

> availability for consultation during final assembly in Bayou Black and Peré's allegations of wrongful death due to improper design and/or manufacture. Peré fails to show such a material connection. The components of the turbine system were manufactured, tested, and delivered to CABGOC in Italy. More importantly, once the components arrived in Bayou Black, Nuovo Pignone did not perform the final assembly; rather, it was CABCOG's contractor who performed this task. Concededly, Nuovo Pignone did send representatives to consult on the mechanical erection of the components onto the platform; however, there is no indication in the record concerning the extent or nature of the consultation or to show it as an integral part of the design or manufacture. While this Court is told that the Nuovo Pignone representatives consulted, we are left to guess at what the consultation involved. There is simply no indication that the final assembly in Bayou Black was part of the design or manufacture that occurred in Italy.

Pet. App. at A8-A9.

By concluding that plaintiff's cause of action need only be "materially connected" to Nuovo Pignone's alleged conduct in Louisiana, the Fifth Circuit disregarded the statutory requirement that the suit be "based upon" the conduct. Such a reading of the statute is inconsistent with the admonition in *Nelson* that the statute requires "something more than a mere connection with, or relation to," the incident conduct before the immunity exception will apply. *Nelson*, 507 U.S. at 358. Notwithstanding the lighter standard, the Fifth Circuit correctly

concluded that the commercial activity exception had not been proved by Petitioner. Pet. App. at A9.

3. The Fifth Circuit Correctly Found that Nuovo Pignone had not Waived its FSIA Immunity.

The only exceptions permitted to the general grant of absolute immunity to foreign sovereigns are those specifically set forth in the FSIA. *Nelson*, 507 U.S. at 355. The first exception deals with waiver of immunity by the sovereign state. Specifically, "a foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in any case (1) in which the foreign state has waived its immunity either explicitly or by implication . . . " 28 U.S.C. § 1605(a)(1). It is clear that Nuovo Pignone has never *explicitly* waived its immunity, and Petitioner has not suggested otherwise. Analyzing Petitioner's implied waiver argument, it is equally clear that the Fifth Circuit was correct in holding that Nuovo Pignone has not *implicitly* waived its immunity either.

The FSIA provides no guidance for determining when a foreign state has implicitly waived its immunity. Thus, courts have examined the FSIA's legislative history in this regard. That history[6] reveals that implicit waivers may be found in three situations:

1. A foreign state agrees to arbitration in another country;

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[6] H.Rep. No. 1487, 94th Cong.2d Sess.18, reprinted in 1976, U.S.C.C.A.N. 6604, 6617. *See also, Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 539 & N. 22 (5th Cir.), *cert. denied*, 506 U.S. 955, 113 S.Ct. 413, 121 L.Ed.2d 337 (1992).

2. A foreign state agrees that a contract is governed by the laws of a particular country; and

3. The foreign state files a responsive pleading without raising the immunity defense.

"Courts have shown great reluctance to stray beyond these three examples of implicit waiver." *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993); *Coleman v. Alcolac, Inc.*, 888 F.Supp. 1388, 1403 (S.D.Tex. 1995). Indeed, since the implicit waiver clause of § 1605(a)(1) must be narrowly construed, "[c]ourts will rarely find that a nation has waived its sovereign immunity without strong evidence that waiver was what the state intended." *Rodriguez* at 287; *Coleman* at 1403.

On appeal and in this Petition, Petitioner asserts that a single contract creates an implied waiver of FSIA immunity – namely, the July 1985 "Agreement No. 133." Pet. App. at E1. Petitioner argues that the arbitration and choice of law clauses in Agreement No. 133[7] constitute an implicit waiver of sovereign immunity by Nuovo Pignone.

Petitioner's suit, however, sounds in tort and does not arise out of a contract dispute involving Agreement No. 133. Pet. App. at D1. Moreover, neither Petitioner nor her decedent are parties to Agreement No. 133. Pet. App.

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[7] Article 18 of Agreement No. 133 specifies that disputes will be resolved through arbitration in Zurich, Switzerland under the rules of the International Chamber of Commerce. Article 19 specifies that all questions relating to performance and execution of the contract are to be governed by Texas substantive law. Pet. App. at E3.

at E1. As correctly observed by the Fifth Circuit, any possible contractual waiver of sovereign immunity contained in Agreement No. 133 is irrelevant to the instant suit. Pet. App. at A10; *see also Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), *cert. denied*, by, *Fletcher's Fine Foods, Ltd. v. Gates*, 516 U.S. 869 (1995) (holding that if the action is in tort and not based upon a contract, there is no need to consider contract provisions in an FSIA waiver analysis); *Kramer v. Boeing Co.*, 705 F. Supp. 1392, 1395 (D. Minn. 1989) (holding that an implied waiver of immunity in a contract executed by a foreign state would have no waiver effect in a tort claim brought against that state). Moreover, none of the cases cited by Petitioner support her contention that an implied contractual waiver of FSIA immunity can be found here; all of the cited cases where an implied waiver was found involved disputes between signatories to the relevant contract and were disputes concerning the contract itself and not some unrelated cause of action. *See Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988) (finding an implied waiver of sovereign immunity in a breach of lease action between a foreign state and its lessor as a result of the terms of the lease agreement between the state and lessor); *Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703, 708 (D.D.C. 1985) (finding an implied waiver of FSIA immunity in a breach of contract action filed by the seller of aircraft against Argentina where the contract between those parties contained a choice of law clause); *see also Ohntrup v. Firearms Center, Inc.* 516 F. Supp. 1281, 1285 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3rd Cir. 1985) (holding that implied waiver of sovereign immunity resulting from

arbitration clause in a contract did not apply to lawsuit filed by third party who was not a signatory to contract). Simply stated, Petitioner cites no authority that would prompt a reversal of the Fifth Circuit's decision on waiver.

CONCLUSION

Petitioner, Nancy G. Peré, asks this Court to review the decision of the United States Court of Appeals for the Fifth Circuit alleging that four reviewable issues should be examined by this Court. As shown above, Petitioner's first issue, inappropriate "tiering" of corporate ownership by a foreign state under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., has been waived due to Petitioner's failure to raise the issue in the court of appeals. Petitioner's remaining issues regarding the timing of sovereign status determination, the standards applied to the "commercial activity" exception and the standards applied to find an implied contractual waiver of the Federal Sovereign Immunity Act have not been shown to be issues on which circuit courts are divided. As such, these issues do not merit this Court's review. S. Ct. R. 10(a). Moreover, the Fifth Circuit correctly decided each of the alleged issues in its reported decision. Nuovo Pignone S.p.A. is entitled to foreign sovereign status under the Foreign Sovereign Immunities Act and no exceptions to that status have been proved by Petitioners. Accordingly, Respondent, Nuovo Pignone S.p.A. respectfully submits that this Honorable Court

should deny the Petition for Writ of Certiorari filed by Plaintiff-Petitioner Nancy G. Peré.

Respectfully submitted,

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App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 97-30572

NANCY G. PERE', individually and on behalf
of her minor children,
Matthew Reed Pere' and Marci Danielle Pere'
Plaintiff-Appellee

versus

NUOVO PIGNONE S.p.A, Et Al
Defendants

NUOVO PIGNONE S.p.A.
Defendant-Appellant

and

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
Lafayette-Opelousas, Louisiana

BRIEF OF APPELLEES

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of her minor children,
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Defendant-Appellant

and

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Nelson E. Canter Pino & Associates	Attorney for Nuovo Pignone S.p.A.
General Electric Company	Third-Party with current ownership interest in Nuovo Pignon, S.p.A.
Cabinda Gulf Oil Company, Division of the Chevron Company	Third Party Employers of Marcus Daniel Pere'

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STATEMENT REGARDING ORAL ARGUMENT

Insofar as the issue raised by the Appellant disputes the District Court's application of prior jurisprudential holdings, Appellees assert that oral argument is unnecessary.

EXPLANATION OF RECORD REFERENCES

The record on appeal includes five volumes of pre-trial pleadings. Throughout this brief, references to these portions of the record will be as follows:

"[R. Vol. ___ at ___]"

The volume and page number will be that appearing on the page in the record on appeal.

The record on appeal also includes the following document/exhibit packages presented to the trial court in connection with the ruling at issue: (1) Attachments to Nuovo Pignone's Motion with Brief for Summary Judgment [R. Vol. 3 at 366]; and (2) Attachments to Plaintiff's Memorandum in Support of Motion for Summary Judgment [R. Vol 4. at 404]. Throughout this brief, references to these documents/exhibits will include the parties' Exhibit designation along with the page number of the Exhibit itself as well as a reference to the Record Excerpts of Appellee as follows:

"[R. Vol. ___ at ___, Exhibit ___ page ___,
Record Excerpts # ___]"

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STATUTES

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28 U.S.C. § 1605(a)(2) 1, 8, 10, 17

STATEMENT OF THE ISSUES

1. Whether the application of the "commercial activities" exception (28 U.S.C. 1605(a)(2)) to the Foreign Sovereign Immunities Act was correctly applied by the District Court.

2. Whether the District Court properly concluded that the determination for the application of foreign sovereignty at the time of the wrongdoing and not as of the time of filing of a claim.

3. Whether Appellant waived its sovereign immunity [pursuant to 28 U.S.C. 1605(a)(1)], either explicitly or by implication, by virtue of the Reconfiguration Agreement executed between Nuovo Pignone S.p.A. and Cabinda Gulf Oil Company, Ltd.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

This tragedy arises out of an October 16, 1993 explosion on the GIP-FOX platform owned by Cabinda Gulf Oil and located off the coast of Cabinda, Angola, West Africa. [R. Vol. 1 at 3] Marcus Daniel Pere´ was killed due to injuries sustained as a result of the explosion. [R. Vol. 4 at 404, Exhibit A]

Initially, several complaints asserting wrongful death claims were filed in this matter, two of which were identical suits filed in the Southern District of Texas in both the Galveston and Houston Division. [R. Vol. 1 at 19]

By Memorandum and Order issued by the Southern District of Texas-Houston Division, the claims filed in the

Southern District of Texas were transferred to the Western District of Louisiana. (R. Vol. 1 at 153-158]

Following the transfer of the claims to the Western District of Louisiana, the parties engaged in limited discovery directed toward the jurisdictional issue raised by Defendants, Pignone, Inc. and Nuovo Pignone, S.p.A., regarding the application of the Foreign Sovereign Immunities Act. Following the conclusion of all discovery, Defendant, Nuovo Pignone, S.p.A, submitted a Motion for Summary Judgment, Memorandum in Support of Motion for Summary Judgment with Attachments. [R. Vol. 3 at 336-368].

In opposition to the filing, Petitioners likewise submitted a Motion for Summary Judgment challenging the Defendant's immunity under the Foreign Sovereign Immunities Act and alleging that various exceptions to the Foreign Sovereign Immunities Act were applicable to Nuovo Pignone, S.p.A. thus eliminating the application of any immunity under the statute.

By Memorandum Ruling, the Honorable Rebecca Doherty denied the Defendant's request for dismissal based on immunity. [R. Vol. 5 at 524-542] The District Judge's denial was based on a finding that the Defendant, Nuovo Pignone, S.p.A. engaged in commercial activity in the United States which was materially connected to the Plaintiff's cause of action.

On May 28, 1997, Nuovo Pignone, S.p.A. filed a Notice of Appeal with this Court together with their Motion to Stay the Trial Proceedings pending the appeal. [R. Vol. 5 at 551-558]

B. Statement of Facts

The facts to this tragedy are undisputed. Marcus Daniel Pere, an employee of Chevron Overseas Petroleum and/or Cabinda Gulf Oil, was in the course and scope of his employment as an instrument technician in Angola, West Africa, when the events giving rise to this litigation occurred. On October 13, 1993, Pere´ was performing maintenance work on the GIP-FOX platform when a starter turbine located on the FC-1C turbine system, exploded causing severe and fatal injuries. [R. Vol. 1 at 21-22)

Named as Defendants in this action were the following:

(1) **Nuovo Pignone, Inc.** a foreign corporation, doing and conducting business within the State of Texas as Pignone, Inc.;

(2) **Pignone, Inc.** a New York corporation doing business within the State of Texas;

(3) **Coppus Engineering,** a foreign corporation doing business within the State of Texas;

(4) **Tuthill Corporation,** a Massachusetts corporation as successor corporation of Coppus Engineering;

(5) **AGIP Petroleum Company, Inc.,** a foreign corporation doing business within the State of Texas. [R. Vol. 1, at 20]

Petitioners' Complaint alleged as an initial cause of action, strict products liability. It was alleged that Nuovo Pignone, Inc., Pignone, Inc. and Coppus Engineering, Inc. designed, constructed, assembled and manufactured the turbine system and its components which Petitioners contend were defective, unsafe and inadequate. Specifically,

the starter turbine on the FC-1C platform was defectively designed, manufactured, modified and improperly combined with a natural gas turbine system. [R. Vol. 1 at 22-23]

Petitioners' second cause of action was founded on negligence wherein Petitioners aver that the afore mentioned [sic] Defendants were negligent in designing, manufacturing, modifying or marketing the FC-1C turbine system in question. Petitioners assert that the Defendants' negligence was the primary and proximate cause of the death of Marcus Daniel Peré.

Additionally, Petitioners' asserted a claim of gross negligence on the part of all Defendants named for designing, manufacturing, modifying and/or customizing and marketing the turbine system without proper regard for the safety of the users of the turbine system. [R. Vol. 1 at 24-25] Petitioners also alleged in their Complaint that the acts of the Defendants were violations of the Texas Deceptive Trade Practices Act and that the alleged defective condition constituted a breach of express or implied warranty. All of the allegations regarding these claims are founded on the Defendants' designing, manufacturing, distributing, modifying and/or customizing, marketing, selling and supplying the gas turbine system which exploded. [R. Vol. 1 at 25-27]

As identified in its Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of their Motion for Summary Judgment, the Petitioners provided the District Court with a brief analysis of the "Nuovo Pignone" family. Petitioners again feel as though it would benefit this Court to be apprised as to

the character and structure of these various entities. Nuovo Pignone, S.p.A. has established an elaborate system of corporate entities with Nuovo Pignone, S.p.A. being the largest of the holding companies and/or parent corporation. The limited discovery conducted revealed that there are separate corporate entities bearing the Nuovo Pignone and/or Pignone, Inc. name throughout the world. In the deposition of Dr. Mario Soncini, it was established that 100 shares of Pignone, Inc. stock is held by Nuovo Pignone International Holding Company, SA. The Nuovo Pignone International Holding Company SA shares are solely owned by Nuovo Pignone, S.p.A. [R. Vol. 4 at 404, Exhibit B page 21, Record Excerpt #3] Dr. Soncini, describes that the function and role of Pignone, Inc., the New York corporation, is as a facilitator and marketer for products produced and manufactured by Nuovo Pignone, S.p.A. within the United States. [R. Vol. 4 at 404, Exhibit C, Record Excerpt #4]

On October 5, 1979, a Purchase Order agreement was entered into between Nuovo Pignone, S.p.A. and a Delaware corporation Cabinda Gulf Oil Company. [R. Vol. 4 at 404, Exhibit E] This Purchase Order agreement reduced to writing several months of the negotiations between Gulf Oil and Nuovo Pignone, S.p.A. wherein Nuovo Pignone representatives were dispatched to Houston, Texas to negotiate the Purchase Order agreement for the sale of the turbo compressor systems.

During 1979, the turbo compressor systems, which were the object of the Purchase Order agreement, were shipped from Florence, Italy to Bayou Black, Louisiana for the assembly of all components of these various systems. [R. Vol. 4 at 404; Exhibit J at 42-49, 81-82, Record

Excerpts #1] Once these turbine systems were assembled and mounted on their respective platforms they were barged to their location off the coast of West Africa. [Id. at 43] During the entire period in which the assembly and construction occurred in Bayou Black, Nuovo Pignone, S.p.A. had representatives present to insure that the assembly was performed properly. [Id. at 83]

Subsequent to the installation of the turbine systems in Africa, the parties continued negotiations in 1985 which resulted in the perfection of Agreement No. 133, also referred to as the Reconfiguration Agreement. The work being performed pursuant to this reconfiguration agreement was best described by Nuovo Pignone representative, Raffaello, Gusso, who described the project as "an overhaul" of various compressor trains. [R. Vol. 4 at 404, Exhibit K page 16, Record Excerpts #2] The specific purpose of reconfiguring the various compressor trains on the G-FOX platform was to increase the horsepower and volume flow of gas travelling through these compressors. Gusso also confirmed that one of the compressor trains which underwent this reconfiguration procedure was the FC-1C train compressor system which was the exact compressor which exploded causing the death of Marcus Peré. [R. Vol. 4 at 404, Exhibit K page 40, Records Excerpts #2]

SUMMARY OF ARGUMENT

Defendants objected and filed their appeal based upon *their* conclusion that the District Court incorrectly applied the "commercial activities" exception to the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(2)).

Petitioners contend and will argue that the District Court made no error in its application of the "commercial activities" exception to the Foreign Sovereign Immunities Act.

Petitioners further argue that the District Court failed to address the exception to immunity found at 28 U.S.C. 1605(a)(1) which provides that a foreign state is not subject to immunity if it has either explicitly or by implication withdrawn the waiver of immunity. Petitioners intend to bring to this Court's attention that Nuovo Pignone waived immunity when it (Nuovo Pignone) entered into Agreement No. 133 for the reconfiguration of the specific turbine system which exploded. This Agreement contains a provision providing that in the event of a dispute pursuant to the Agreement, the laws of the State of Texas would apply.

Lastly, since the standard for review for this judicial body is de novo, Petitioners would argue that the District Court improperly applied the jurisprudence regarding the issue of timing, as to whether or not Nuovo Pignone, S.p.A. should be granted immunity since it was not a foreign state at the time the Petitioners filed their Complaint.

LAW AND ARGUMENT

Applicable Standard of Review

Petitioners concur that the Defendant, Nuovo Pignone, has correctly stated that the standard of review in this matter is *de novo* pursuant to *Tubular Inspection, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 (5th Cir. 1992).

The Trial Court Properly Applied the Commercial Activities Exception to the Foreign Sovereign Immunities Act

As the introductory paragraph asserts in *Stena Redei AB v. Comision de Contratos Del Comite,* 923 F.2d 380 (5th Cir. 1991), the Foreign Sovereign Immunities Act of 1976 "has been a constant bane of the Federal judiciary". The "commercial activities" exception which is the subject of dispute in this appeal, is found at 28 U.S.C. 1605(a)(2). This subsection of the FSIA identifies three commercial acts which must be sufficiently connected to the United States to satisfy the jurisdictional nexus requirement. These three commercial acts are as follows:

1. A commercial activity carried on in the United States;

2. An act performed in the United States in connection with a commercial activity carried on outside the United States;

3. A commercial activity carried on outside the United States that has a direct effect in the United States.

In the event that the foreign sovereign engages in one of these three activities then it is not immune from the judicial process but the commercial activity must be the basis or jurisdictional nexus for the cause of action. This criteria has been adopted by this court in *Stena Redei AB v. Comision de Contratos Del Comite,* 923 F.2d 380 (5th Cir. 1991). As the District Court correctly identified, citing *Stena,* supra, the requirements under the FSIA of a connection between the Petitioners' cause of action and the commercial act of the foreign sovereign requires a direct causal connection. This court in *Stena* stated that "the

connection between the cause of action and the sovereign's commercial act in the United States must be material."

Having reviewed all of the criteria identified by this Court in *Stena,* Judge Doherty correctly applied the criteria finding that the mere act of assembly and construction of these turbine systems onto various platforms in Bayou Black, Louisiana were *materially related* to the Petitioners' claims.

Defendants seek to engage in "semantic warfare" by asserting that the District Court committed manifest and/or reversible error by failing to use the criteria identified in *Saudi Arabia v. Nelson,* 507 U.S. 349, 113 S.Ct. 1479, 123 L.Ed.2d 47 (1993). Defendants complain and assert that the trial court committed reversible error by failing to use the term "based upon" rather than "materially related" in establishing a nexus between Petitioners' causes of action and the Defendant's commercial activity. Petitioners would argue that the term "materially related" is a far stronger term than the language extracted from *Saudi Arabia v. Nelson,* supra. It is suggested to this Court that reversal is not warranted based on a lower court's determination or choice of verbiage. Petitioners would add that in the event the allegations contained in their complaint are proven, then they (Petitioners) would be entitled to an award of damages under the various theories cited.

What the Supreme Court provided in *Saudi Arabia v. Nelson,* was a clearer definition of the term "commercial activity". The Supreme Court held that:

> **"The commercial character of an act is to be determined by reference to its nature rather than its purpose, the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of action by which a private party engages in trade and traffic or commerce."**

There is no doubt and it remains undisputed that the actions of Nuovo Pignone, S.p.A. are identical to those of a private person or entity engaged in the trade of selling and marketing turbo compressor systems for mineral exploration. It is clear to the Petitioners that when adopting the *Nelson*, supra definition of "commercial activity" that Nuovo Pignone, S.p.A. has engaged in "commercial activity" within the terms of the definition cited. As will be explained later in this brief, the claims of the Petitioners are not only "based upon" the conduct of Nuovo Pignone representatives in Louisiana but also upon all of the acts within the United States engaged in by Nuovo Pignone and/or its agents, subsidiaries or employees regarding the negotiation, purchase, assembly, installation, and modification of the FC-1C turbo compressor train which exploded.

The Defendants would have this Court believe that the only isolated instance in which a representative from their company appeared in the United States was for the assembly and construction of the turbine system onto a platform in Bayou Black, Louisiana. Petitioners would

caution this Court that there exits [sic] more to the Defendants' conduct within the United States than the mere appearance of a Nuovo Pignone representative in Louisiana. As previously indicated, not only was a representative sent to Bayou Black, Louisiana, but prior to the construction of these turbine systems, representatives travelled to Houston, Texas to engage in negotiations and exchange various designs prior to the perfection of the Purchase Order agreement.

The jurisprudence has recognized that an activity is commercial if it is the type of activity which a private person or entity would commonly engage in for profit. *Callejo v. Bancomer SA*, 764 F.2d 1101, 1108 n. 6 (5th Cir. 1985); *Repsa Fabricacion SA v. Petrolcos Mexicanos*, 961 F-2d 1198 (5th Cir. 1992); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988). Additionally, various courts have held that negotiations for contract to purchase goods or services is considered to be a commercial activity within the meaning of the FSIA. *Gould, Inc. v. Pechiney Ugine Kuhlmann*, supra *citing Texas Training and Mill, Inc. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied* 454 U.S. 1148, 102 S. Ct. 1012, 71 L. Ed. 2d 301 (1982); *Obenchain Corp. v. Corp. Nacionale de Inversiones*, 656 F.Supp. 435 (W.D. Pa. 1987). Petitioners would call to the Court's attention that not only did Nuovo Pignone, S.p.A. dispatch representatives to negotiate the purchase order agreement for the original sale of these turbo compressor systems but representatives were also sent to negotiate the reconfiguration agreement (Agreement Number 133). [R. Vol. 4 at 404, Exhibit E and F] Interestingly, these two negotiated contracts provided Nuovo Pignone, S.p.A. a total consideration of

$24,340,482.00 [R. Vol. 4 at 404, Exhibit J page 30, Record Excerpts #1, Exhibit E page 31, Record Excerpts #6, Exhibit K pages 17-18, Record Excerpts #2, and Exhibit F page 35, Record Excerpts #5]

The greatest evidence of the fact that Nuovo Pignone, S.p.A. engaged in "commercial activity" within the United States is the fact that a subsidiary of Nuovo Pignone, S.p.A., Pignone, Inc. was created and formed, as a New York corporation, solely to assist Nuovo Pignone, S.p.A. for the purposes of marketing and selling the products produced by the Defendant corporation.

The commercial activities exception also requires an analysis as to whether the entity asserting an FSIA defense has substantial contacts with the United States. This issue was discussed in *Re Rio Grande Transport, Inc.*, 516 F.Supp. 1155 (S.D. N.Y. 1981). The Court in this case denied the shipping company's motion for summary judgment with respect to its claim for immunity from jurisdiction. This claim involved a vessel collision which occurred between the continents of Europe and Africa. The, *Rio Grande* court concluded there existed sufficient jurisdictional nexus since the defendant's vessels regularly called upon U.S. ports and received substantial income from those activities.

Applying this same analysis, the United States comprises at least 20% of Nuovo Pignone, S.p.A.'s sales. It is estimated that these sales gross at or near $100 million per year [R. Vol. 4 at 404, Exhibit B page 40, Record Excerpts #3] Not only are these sales figures a significant indication of the amount of commercial activity being carried on by Nuovo Pignone, S.p.A. within the United

States, Nuovo Pignone has also created a corporate hierarchy and has opened offices for its United States subsidiary in New York, Houston, and Los Angeles. [R. Vol. 4 at 404, Exhibit C, Exhibit B pages 35-36]

As further evidence of the substantial contacts Nuovo Pignone, S.p.A. maintains in the United States, Dr. Mario Soncini identified other Nuovo Pignone customers as Mobil Oil Company, Amoco, Phillips Petroleum, Parsons Engineering, and Brown and Root. [R. Vol. 4 at 404, Exhibit B pages 38-39, Record Excerpts #3] Lastly, Petitioners would bring to this court's attention the fact that Nuovo Pignone, as a continuing marketing practice, places advertisements for its services and products in several of the recognized trade journals distributed throughout the world, including the United States. [R. Vol. at 404, Exhibit M pages 23-26]

This Court should remove the isolated view which Defendants seek to impose in attempting to defeat the application of the commercial activities exception. Defendants would like nothing more for this Court to only examine the fact that a representative from its corporate headquarters travelled to Bayou Black, Louisiana to supervise the installation and construction of the turbine systems onto the deck platforms prior to their shipment to Africa. Petitioners call to the attention of this Court, that the entire conduct and actions of Nuovo Pignone, S.p.A. should be examined to determine whether the District Court correctly applied the commercial activities exception. The evidence submitted in support of Petitioners' assertion that the commercial activities exception should be applied is abundant and plentiful. Certainly

when viewed in totality the negotiation, sale, construction, assembly and reconfiguration of the turbo compressor systems sold by Nuovo Pignone definitely have a "based upon" nexus to the Petitioners' causes of action.

In support of their position the Defendants attempt to draw an analogy to and cite *Philos v. Lot Polish Airlines*, 939 F.Supp. 199, (E.D. N.Y. 1996). Petitioners bring to the Court's attention that at no time in *Philos*, did a representative of the Russian company travel to the United States for maintenance of the alleged aircraft. As the Defendant points out, the Russian consultants maintained a station in Poland, who then communicated with third party engineers in the United States. The facts of this case can easily be distinguished from the case at bar.

In response to this, Petitioners would cite to the Court the case of *Barcanic v. C.A.A.C.*, 822 F.2d 11 (2 Cir. 1987) where the appellate panel upheld a trial court's ruling that a wrongful death action could be maintained against the Chinese government where the crash occurred in China, but the airline ticket was purchased in the United States. Specifically, the Chinese government, who owned a majority of the airline, was denied immunity from suit under the Foreign Sovereign Immunities Act based on their commercial activity. Petitioner would argue that if the purchase of a ticket constitutes "commercial activity" within the meaning of the FSIA, then certainly the multitude of actions engaged in by Nuovo Pignone in the United States constitutes "commercial activity" within the definition of 28 U.S.C. 1605 (a)(2) subjecting the Defendants to jurisdiction.

Nuovo Pignone, S.p.A. Has Waived Its Sovereign Immunity

Petitioners strongly also argue that the Defendant, Nuovo Pignone, S.p.A. has waived its sovereign immunity based upon the exception codified at 28 U.S.C. § 1605 (a)(1). Recent jurisprudence has hold that implicit waivers are found only where a foreign state has agreed to arbitration in another country, *the foreign state has agreed that the law of a particular country should govern a contract,* or the foreign state has filed responsive pleadings without raising the defense of sovereign immunity. *Gates v. Victor Fine Foods,* 54 F.3d 1457 (9th Cir. 1995)

Petitioners assert that Nuovo Pignone, S.p.A. has implicitly waived its sovereign immunity by virtue of the Reconfiguration Agreement (Agreement No. 133) it entered into with Cabinda Gulf Oil. Specifically, on page 24 of the Agreement, provision 19, Nuovo Pignone, S.p.A. subjects itself to the laws of the State of Texas. [R. Vol. 4 at 404, Exhibit F page 24, Record Excerpts #5]

This document describes the obligations of each party as well as the "overhaul" of the FC-1C compressor train which exploded killing Marcus Daniel Pere'. [R. Vol. 4 at 404, Exhibit K page 40] As previously indicated, the purpose of the reconfiguration of the compressor trains on the GIP-FOX platform was to increase the horsepower and flow of gas travelling through the various compressors. This Agreement also contains provisions involving warranty, as well as indemnification clauses. The

warranty provisions specifically warrants that the materials and workmanship to be performed by Nuovo Pignone employees *shall be free of defect.* [R. Vol. 4 at 404, Exhibit F, provision 9.11, Record Excerpts #5]

Clearly, this contract also involves the workmanship performed by Nuovo Pignone on the exact compressor train which exploded causing the death of the Petitioner. The explicit and/or implicit waiver exception raised by the Petitioners before the District Court was not addressed in the Court's Memorandum Ruling. However, Petitioners assert that since this is a de novo review by this Court, the waiver exception found at 28 U.S.C. 1605 (a)(1) is also applicable to Nuovo Pignone, S.p.A. Petitioners argue that immunity should be denied Nuovo Pignone since it has implicitly waived the desired immunity by virtue of the reconfiguration agreement – Agreement No. 133.

Does the Foreign Sovereign Immunity Act Apply to Nuovo Pignone, S.p.A.?

As indicated previously, the Petitioners would ask this Court to review the findings of the District Court wherein it was concluded that the determination as to whether the FSIA is applicable is to be made at the time of the wrongdoing and not at the time of the filing of the complaint. In an entity known as ENI owns 61% of Nuovo Pignone stock as of October 4, 1993. [R. Vol. 4 at 404, Exhibit D] However, on the day that the complaint was filed, the majority of the Nuovo Pignone, S.p.A. stock had been transferred to a consortium of companies primarily represented by General Electric. The Petitioners

present this issue to this Appellate panel based on a split in the circuits as to when the FSIA is to be applied.

The Eighth Circuit addressed this issue in *General Electric Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993). The Eighth Circuit concluded that the determination as to whether an entity qualifies as a foreign sovereign must be examined as of the time of the complained of actions giving rise to the litigation. However, the Ninth Circuit holding in *F. Straub v. A. P. Green*, 38 F.3d 448 (9th Cir. 1994), held that a corporation identity must be examined *at the time suit is instituted.* Both of the aforecited cases have differing factual circumstances, however, Petitioners assert that the holding in *Straub*, which established that the corporation's identity should only be examined as of the date suit is filed, is in keeping with the legislative history of the FSIA. As of this time, Petitioners are unaware of any Fifth Circuit holding addressing this issue. Petitioners argue that this Circuit should adopt the criteria defined in *Straub*, supra, and look to the corporation's identity at the time of filing to determine whether the foreign sovereign immunity defense is applicable.

CONCLUSION

Petitioners strongly assert that the District Court did not err in concluding that the commercial activities exception is applicable to Nuovo Pignone, S.p.A. Petitioner, on behalf of her minor children, would ask this court to review the totality of the actions of Nuovo Pignone, S.p.A. from the initial negotiations through the perfection of the Reconfiguration Agreement it entered into regarding these turbo compressor systems. It should

be clear that when all of Nuovo Pignone's actions are taken into consideration, this Court would and should conclude that the Defendants engaged in significant commercial activity within the United States, and in particular, in regards to the FC-1C compressor train. It is for these reasons that Petitioners assert that the District Court correctly applied the commercial activities exception, stripping Nuovo Pignone of its sovereign immunity.

Petitioners further submit to this court that there has been an implicit, if not explicit, waiver of immunity by Nuovo Pignone, S.p.A. pursuant to Agreement 133. Petitioners would also argue that this implicit waiver is directly related to the causes of action identified in Petitioners' complaint. All of the Defendants' actions described by the Petitioners are clearly "based upon" the commercial activity engaged in by the Defendants in regards to the FC-1C turbo compressor train.

Since this is a de novo review of the issues presented, Petitioners request that this Court review and address the issue as to whether or not Nuovo Pignone S.p.A. is entitled to sovereign immunity under the Act since it was not a foreign state at the time of the filing of the complaint. Petitioners argue that this Circuit should adopt the holdings and reasoning of the Ninth Circuit when addressing this issue.

In conclusion, Petitioners feel as though they have "bombarded" this Court with cite after cite of sworn testimony and documentation acknowledging the commercial activities which Nuovo Pignone, S.p.A. engaged

in which were in *direct* relation to the design, manufacture, reconfiguration and servicing of the FC-1C compressor train. We submit that the evidence in sworn statements provided exposes the cabal of corporate entities created by Nuovo Pignone, S.p.A. in their effort to attempt to insulate themselves from liability while continually "sucking" millions of dollars from the U.S. market in direct competition with U.S. corporations. Petitioners will remind this Court that the total consideration paid to the Defendants under the various agreements exceeded $24,800,000.00. For the Defendants to argue before this Court that it is not engaged in commercial activity or that the commercial activity exception is not applicable is absurd!

Petitioners close by stating that based on the evidence produced, statutory provisions and Jurisprudence cited, Nuovo Pignone, S.p.A. is not entitled to immunity under the FSIA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Brief of Appellees by mailing the same by U.S. Mail, properly addressed and first class postage prepaid to the following:

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Abbeville, Louisiana, this 3rd day of February, 1998.

/s/ K. Wade Trahan
K. Wade Trahan

App. 28

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 97-30572

NANCY G. PERE', on behalf of Matthew Reed Pere',
on behalf of Marci Danielle Pere',
individually and on behalf of her minor children
Plaintiff-Appellee

versus

NUOVO PIGNONE S.p.A.;, ET AL
Defendants

NUOVO PIGNONE S.p.A.;
Defendant-Appellant

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
Lafayette-Opelousas Division

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-30572

NANCY G. PERE', on behalf of Matthew Reed Pere',
on behalf of Marci Danielle Pere',
individually and on behalf of her minor children
Plaintiff-Appellee

versus

NUOVO PIGNONE S.p.A.;, ET AL
Defendants

NUOVO PIGNONE S.p.A.;
Defendant-Appellant

COPPUS ENGINEERING; TUTHILL CORPORATION
Defendants-Appellees

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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General Electric Company	Third-Party with current ownership interest in Nuovo Pignone S.p.A.
Cabinda Gulf Oil Company,	Third-Party Employers of Marcus Pere'

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STATEMENT REGARDING ORAL ARGUMENT

This matter involves the application of the Foreign Sovereign Immuities Act (28 U.S.C. § 1602 *et seq.*) to the clear facts of the instant matter. Accordingly, Tuthill Corporation/Coppus Engineering respectfully avers that oral argument is not necessary in the present matter.

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STATEMENT OF THE JURISDICTION

This is an appeal from a district court order rejecting Appellant's challenge to the court's subject matter jurisdiction under the Foreign Sovereign Immunities Act (28 U.S. 28 U.S.C. § 1602 *et seq.*). (T.R. p. 524) The order was entered on April 30, 1997, and a time [sic] Notice of Appeal was filed on May 28, 1997. (T.R. p. 551) The matter is immediately appealable under the collateral order doctrine. *See, Stena Rederi AB v. Comision de Contratos,* 923 F.2d 380, 385 (5th Cir. 1991).

STATEMENT OF THE ISSUES

1. Whether the trial court correctly found the commercial activities engaged in by Nuovo Pignone S.p.A.

deprived it of immunity under the "commercial activities" exception of the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(2)).

2. Whether a corporation, which was majority owned by a foreign sovereign at the time a claim arose, but was not so owned at the time suit was filed, is entitled to protection under the Foreign Sovereign Immunities Act.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

This matter arises out of an accident which occurred off the coast of Angola, Africa, in 1993. As a result of the accident, Marcus Peré was killed. His widow, Nancy Peré, instituted this action in the District Court for the Western District of Louisiana, setting forth a claim under the Death on the High Seas Act (46 U.S.C. § 761 *et seq.*), and naming as defendants, Nuovo Pignone, Inc., Tuthill Corporation, Coppus Engineering and AGIP Petroleum Company, Inc. (T.R. p. 1-4); plaintiff also filed suits against the same defendants in the District Courts for the Southern District of Texas, Galveston and Houston Divisions, alleging claims for products liability. The Galveston suit was dismissed due to the pendency of the Houston claim and the Houston claim was then dismissed due to the pendency of the instant matter. The Houston claim was then reinstated and transferred to the Western District of Louisiana pursuant to 28 U.S.C. § 1404(a), and was consolidated with the DOHSA claims. (T.R. p. 18, 153-158) Plaintiffs claims against AGIP USA, Inc. were dismissed

by the trial court for lack of personal jurisdiction. (T.R. p. 550)

Nuovo Pignone S.p.A. (Pignone) filed a Motion for Summary Judgment, alleging that it was entitled to immunity under the Foreign Sovereign Immunities Act, and plaintiff filed a Cross Motion for Summary Judgment seeking a ruling that Pignone was not entitled to such immunity. (T.R. p. 336, 372) The trial court found that the motion filed by Pignone was more properly considered a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. Pro. 12(b)(1). (T.R. p. 527) The trial court then found that Pignone was majority owned by ENI, an agency or instrumentality of the Italian government at the time of the accident, but was sold and the majority of its stock held by a private consortium led by General Electric at the time suit was filed. (T.R. p. 531, 538) The trial court then held that the time for determining the applicability of the FSIA is at the time of the events giving rise to its action. (T.R. p. 536-537) Although the court found that Pignone was an agency of the Italian government at the time of the accident, she found that Pignone had engaged in commercial activities within the United States that were materially connected to the plaintiff's cause of action. The motion was therefor [sic] denied. (T.R. p. 542)

B. STATEMENT OF THE FACTS

In 1974, AGIP USA, Inc. (AGIP) placed an order for starter turbines with then Coppus Engineering Corp. (Coppus). AGIP was a procurement agent for Pignone

located in the United States. (T.R. p. 423) In approximately July, 1974, Coppus delivered the starter compressors, including the subject starter compressor, and same were apparently shipped to Nuovo Pignone in Florence, Italy by AGIP.

On or about October 5, 1979, a Purchase Order Agreement was entered into between Pignone, Cabinda Gulf Oil Company (CABGOC), and Sociedade Nacional de Combustivels (SONIGAL). Negotiations for the Purchase Order Agreement occurred between the representatives of Pignone and the other principals in Houston, Texas and Florence, Italy. (T.R. p. 424) Subsequently, Pignone partially manufactured and assembled the contemplated turbo compressor systems, and shipped the incomplete packages for the turbo compressors to Bayou Black, Louisiana for final manufacturing and assembly onto the platform. (T.R. p. 423, 425-426) In addition to sending the partially completed turbo compressor systems to Louisiana, Pignone also provided personnel to supervise their final assembly and installation on the platform. (T.R. p. 423) After completion of the manufacture and assembly of the various platforms, same were shipped from Bayou Black, Louisiana to the Molongo Field in Cabinda, Angola Africa.

On June 10, 1985, Pignone and CABGOC entered into a Reconfiguration Agreement (Agreement Number 133) to reconfigure the FC1C compressor train (the subject turbo compressor). (Attached as Exhibit "F" to Plaintiff's Motion for Summary Judgment and filed in the record separately as an exhibit.) (T.R. p. 404) Negotiations for Agreement Number 133 took place in both Houston, Texas and Florence, Italy. Two other contracts were

entered into between Pignone and Cabinda Gulf Oil when Agreement Numbers 1076 and 1149 were negotiated for the servicing of the turbo compressor systems at the Cabinda field. Agreement 1076 was dated September 1, 1992, and executed May 31, 1993. Agreement Number 1149 had a commencement date of March 1, 1993. (Attached as Exhibits "G" and "H", respectively, to Plaintiff's Motion for Summary Judgment and filed in the record separately as an exhibit.) (T.R. p. 404) The subject accident occurred during the servicing of the subject compressors and a Pignone representative was on location at the time of the accident. (Attached as Exhibit "L" to Plaintiff's Motion for Summary Judgment and filed in the record separately as an exhibit.) (T.R. p. 404)

SUMMARY OF THE ARGUMENT

The District Court properly found that the commercial activities of the exception of the Foreign Sovereign Immunities Act applied where the defendant seeking immunity engaged in both marketing and sales of their product within the United States, and also partially manufactured/assembled the subject turbo compressors in Bayou Black, Louisiana. The Court found that this is a products liability act by plaintiff, which alleges the items specifically assembled in the State of Louisiana, such that plaintiff's cause of action was based upon the commercial activities of Nuovo Pignone S.p.A. within the United States.

This defendant would further aver that the purpose of the FSIA is best forwarded by a determination of status under the Act at the time suit is filed, rather than at the time the acts giving rise to the cause of action took place.

ARGUMENT

Nuovo Pignone S.p.A. has raised the Foreign Sovereign Immunities Act defense (FSIA). The FSIA (28 U.S.C. § 1603),[1] sets forth the sole and exclusive standard to be used to resolve all sovereign immunities issues raised in federal and state courts. While the FSIA recognizes the

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[1] For purpose of this chapter –

(a) A "foreign state", except as sued in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means an entity – (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332© and (d) of this title, nor created under the laws of any third country.

© The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

general rule that foreign states are entitled to immunity from jurisdiction in American courts, § 1605 codifies several exceptions to that rule. *Arriba, Ltd. v. Petroleos Mexicanos,* 1962 F.2d 528, 532 (C.A. 5, Tex 1992)

> The foreign state bears the burden for persuasion on the issue of immunity under the FSIA, but once a *prima facia* showing of immunity has been made, the plaintiff seeking to litigate "in the district court bears the burden of coming forward with facts showing that an exception applies." *Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 172 (C.A. 5) (Miss. 1994).

The ultimate burden of persuasion remains at all times upon the party forwarding the FSIA defense. *Forsythe v. Saudi Arabian Airlines Corp.,* 885 F.2d 285, 289 (C.A. 5) (1989).

I. THE TRIAL COURT CORRECTLY DETERMINED THAT NUOVO PIGNONE ENGAGED IN COMMERCIAL ACTIVITY IN THE UNITED STATES AND WAS THEREFORE NOT ENTITLED TO IMMUNITY UNDER THE FSIA.

28 U.S.C. § 1605 provides the general exceptions to jurisdictional immunities of a foreign state. The applicable portions of § 1605 state:

> "A foreign state shall not be immune from the jurisdiction from the courts of the United States or of the states in any case –
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver

> which the foreign state may purport to effect in accordance with the terms of the waiver; and
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere, and that act causes a direct effect in the United States . . .

§ 1603(d) defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. § 1603(e) further provides, "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States."

"Legislative history indicates that Congress intended to adopt the so-called 'restrictive theory' of sovereign immunity; that is the sovereignty of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." *The Export Group v. Reef Industries, Inc.*, 54 F.3d 1466 (9th Cir. 1995).

As stated above, the Act provides that commercial activity must either be a regular course of commercial conduct or a particular commercial transaction or act. In the present case, it is clear that Pignone engaged in a

regular course of commercial conduct in that it conducted business in the United States itself and through its subsidiary, Pignone, Inc.[2], and that it intended to have a presence in the United States sales market. (T.R. p. 433) In 1993, Pignone recorded some $100 million in U.S. sales, which represented some 10-15% of the income, not including its textile market. (T.R. p. 434)

The fact that Nuovo Pignone S.p.A. is engaging in commercial conduct in the United States is irrefutable. It has been operating as any other private company has been operating and this fact is further buttressed by its eventual sale to General Electric in 1993. The activities of Nuovo Pignone S.p.A. do not have any sovereign character about them. The activities included the manufacture and sale of turbo compressor units within the United States similar to that performed by many other private organizations throughout the world.

Pignone argues that plaintiff's claims are not "based upon" its commercial activities in the United States. As stated in Pignone's brief, the Supreme Court in *Saudi v. Nelson*, supra, found the statute provides no definition of the phrase "based upon", but that the phrase is "read most naturally to mean those elements of a claim that, if proven, would entitle plaintiff to relief under his theory of the case." *Id.* at 357. The Court further stated that it was not necessary that each and every element of the

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[2] Pignone, Inc. was a wholly owned subsidiary of Nuovo Pignone S.p.A. and was a New York corporation. The corporate purpose of Pignone, Inc. was to market and promote the products of Nuovo Pignone S.p.A. in the United States. (T.R. p. 429)

claim be commercial activity by the foreign state. *Id.* at Fn. 4. In that case, the plaintiff sought damages resulting from imprisonment and torture while he was in Saudi Arabia. The Court found that the activity in question, the use of police power, was particularly sovereign in nature since persons in the private sector cannot exercise the powers of police and penal officers. "Such acts as legislation, or the expulsion of an alien, or denial of justice cannot be performed by an individual acting in his own name." *Id.* at 1480.

The instant matter is a products liability claim brought by the widow of Marcus Pere´ for his wrongful death. Plaintiff has alleged (in the Texas action which has been joined with this action) that Pignone negligently designed, manufactured, modified, and marketed the turbine system, which is the subject of this lawsuit. (T.R. p. 22) Nuovo Pignone S.p.A. has admitted that at least some of the manufacturing/assembly and marketing was performed in the United States. (T.R. p. 423)

Pignone points out that no disassembly of the turbines was necessary before shipping the huge turbines from Italy to Louisiana. That is because the incomplete components such as the electrical panels, ducting, compressor tank, the exhaust system were finally assembled in Louisiana. (T.R. p. 426) In other words, the manufacture of the turbines was not completed until the turbines were in the United States. The corporate representative presented for deposition did not know how many

persons were sent by Pignone to supervise the completion of the manufacturing process. (T.R. p. 423)[3]

This Court reviewed a factually similar case in *Aldy v. Valmet Paper Machinery*, 74 F.3d 72 (5th Cir. 1996). In *Aldy*, there was no dispute that the defendant was a "foreign sovereign" that designed and manufactured paper machine in Finland. One of those machines killed two persons and the wrongful death claim ensued. *Id.* at *75.* The court found that plaintiffs' suit appeared to be a classic design and manufacturing defect suit, which it found was covered by the Commercial Activities Exception of the Act.[4] *Id.* at *75.* In reaching that conclusion, this Court stated:

> The plain language of the provision limits our analysis to determining whether the Aldys' and Malones' lawsuits are 1) based upon an act outside the U.S., 2) that was taken in connection with a commercial activity of Valmet outside the U.S.; and 3) that caused a direct effect in the *U.S. Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 112 S.Ct. 2160, 2164, 119 L.Ed. 2d 394 (1992).

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[3] It is interesting to note that Pignone refers to the testimony of Cioncolini as vague and speculative when he was presented as the Manager of Gas and Compressor Sales at the time of this manufacture. Further, he was produced pursuant to a 30(b)(6) Notice of Deposition of Pignone. (T. R. p. 244)

[4] This Court utilized the third clause of the Commercial Activities Exception finding that the action was based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere, which caused a direct effect in the United States.

> The first two elements ensure that "there must be a connection between the plaintiff's cause of action and the *commercial acts* of the foreign sovereign." *Stena Rederi*, 923 F.2d at 386 (emphasis added). The Aldys' and Malones' suits are based upon the commercial acts of Valmet outside the U.S. Valmet does not dispute that it is in the business of designing and manufacturing paper machines in Finland, nor does it dispute that it designed and manufactured the paper machine in which Aldy and Malone were killed. Moreover, the gravamen of the plaintiffs' suits are that the paper machine "was unreasonably dangerous in its construction, make-up composition and design." In short, the plaintiffs' suits appear to be classic design and manufacturing defect suits, which the third clause of the commercial activities exception is broad enough to cover. *Id.* at 75 (*Citing, Ohntrup v. Firearms Center Inc.*, 516 F.Supp. 1281, 1286-87 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985)).

Defendants submit that *Aldy* supports the proposition that the plaintiffs products liability claims are "based upon" Pignone's commercial activities in the United States where at least some of the manufacturing took place.

Defendants would submit that Pignone engaged in a regular course of commercial conduct within the United States, and that plaintiffs' claim is based upon a particular transaction that occurred within the United States, either of which conveys jurisdiction under § 1605(2). The subject turbine was marketed and sold within the United

States, then partially manufactured in Bayou Black, Louisiana. Pignone should not be entitled to sovereign immunity under these facts.

II. THE DETERMINATION OF FSIA STATUS SHOULD BE MADE AT THE TIME OF FILING OF SUIT

It is undisputed that at the time suit was filed in the instant matter that Nuovo Pignone S.p.A. was majority owned by a group of investors led by General Electric Corporation, a U.S. corporation. In the event this Court should find that Pignone did not fall within the commercial activities exception, defendants submit that under the Act, the status of a sovereign state should be made at the time of filing of suit to comport with the purpose of the Act.

Defendants readily admit that courts have not resolved the question of whether one must look at the time of the events allegedly giving rise to the liability to determine whether an entity is a "foreign state" under the Act, or to the time at which the action is brought. In *Straub v. AP Green, Inc.*, 38 F.2d 448 (C.A. 9, 1994), the court held that one must look to the time when the lawsuit was filed to make the determination, perhaps even if the entity did not have foreign state status at the time of the alleged wrong-doing. The court in *General Electric Corp. v. Grossman*, 991 So.2d 1376 (8th Cir. 1993), reached the conclusion that status must be determined as of the time of the complained of actions giving rise to the suit.

Defendants would submit examination of the purpose of the Foreign Sovereign Immunities Act supports the conclusion reached in *Straub*. Congress enunciated the purpose of the Foreign Sovereign Immunities Act in 28 U.S.C. § 1602 as follows:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Courts have also interpreted the Act's purpose as "designed to promote harmonious international relations by respecting governmental immunities recognized in international law while permitting claims arising out of ordinary commercial activities." *Pullman Construction Industries, Inc, v. United States of America*, 23 F.3d 1166, 1169 (1994), citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 113 S.Ct. 1471 (1993).

It is respectfully submitted that since the purpose of the Act was to promote "harmonious international relations," the appropriate time for determining the status of an entity claiming immunity under the FSIA is the time of

filing suit. It is only logical that international relations are unaffected, at least in most cases[5], in a suit against an entity which was formerly clothed with immunity, but now a member of the private sector. Certainly, under the facts of the present case, no governmental purpose is achieved by clothing a machinery corporation now owned by a domestic company with immunity.

It is, therefore, respectfully submitted that the Court should look to the date of filing of suit for the determination on the issue of status and, thereby, reject the claims for immunity by Nuovo Pignone S.p.A.

CONCLUSION

The trial court properly determined that Nuovo Pignone S.p.A. engaged in commercial activity in the United States materially connected to the plaintiff's cause of action such that it is not entitled to immunity under the FSIA and should be affirmed. Defendant would alternatively submit that the appropriate time to consider the application of the FSIA is at the time suit is filed, which

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[5] Defendants could conceive of cases where a government may have an interest in maintaining the immunity for a foreign entity which was formerly a foreign state to protect the national security of that foreign state due to confidential information being held by that entity.

would also lead to an affirmation of the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing Brief of Appellees by mailing the same by U.S. Mail, properly addressed and first class postage prepaid to the following:

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